

By: Harris

S.B. No. 1178

A BILL TO BE ENTITLED

AN ACT

relating to guardianships of incapacitated persons; providing a criminal penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 606(d), Texas Probate Code, is amended to read as follows:

(d) Notwithstanding any other law, in [In] those counties in which there is a statutory probate court, all applications, petitions, and motions regarding guardianships, mental illness matters, or other matters addressed by this chapter shall be filed and heard in the statutory probate court~~[, unless otherwise provided by law]~~.

SECTION 2. Section 607(c), Texas Probate Code, is amended to read as follows:

(c) In all actions by or against a person in the person's capacity as a guardian, a statutory probate court has concurrent jurisdiction with a district court. For purposes of Subsection (b) of this section, a cause of action by or against a person in the person's capacity as guardian is considered a cause of action appertaining to or incident to a guardianship estate only if the cause of action is related to the settlement, partition, or distribution of the estate.

SECTION 3. Section 608, Texas Probate Code, is amended to read as follows:

1 Sec. 608. TRANSFER OF GUARDIANSHIP PROCEEDING. A judge of a
2 statutory probate court, on the motion of a party to the action or
3 of a person interested in a guardianship, may transfer to the
4 judge's court from a district, county, or statutory court a cause of
5 action appertaining to or incident to a guardianship estate that is
6 pending in the statutory probate court or a cause of action relating
7 to a guardianship in which a guardian, ward, or proposed ward in a
8 guardianship [~~personal representative of an estate~~] pending in the
9 statutory probate court is a party and may consolidate the
10 transferred cause of action with the other proceedings in the
11 statutory probate court relating to the guardianship estate.

12 SECTION 4. Section 633, Texas Probate Code, is amended by
13 amending Subsections (d) and (f) and adding Subsection (d-1) to
14 read as follows:

15 (d) The [~~court clerk, at the applicant's request, or the~~]
16 applicant shall mail a copy of the application for guardianship and
17 a notice containing the information required in the citation issued
18 under Subsection (b) of this section by registered or certified
19 mail, return receipt requested, or by any other form of mail that
20 provides proof of delivery, to the following persons, if their
21 whereabouts are known or can be reasonably ascertained:

- 22 (1) all adult children of a proposed ward;
23 (2) all adult siblings of a proposed ward;
24 (3) the administrator of a nursing home facility or
25 similar facility in which the proposed ward resides;
26 (4) the operator of a residential facility in which
27 the proposed ward resides;

1 (5) a person whom the applicant knows to hold a power
2 of attorney signed by the proposed ward;

3 (6) a person designated to serve as guardian of the
4 proposed ward by a written declaration under Section 679 of this
5 code, if the applicant knows of the existence of the declaration;

6 (7) a person designated to serve as guardian of the
7 proposed ward in the probated will of the last surviving parent of
8 the ward; ~~and~~

9 (8) a person designated to serve as guardian of the
10 proposed ward by a written declaration of the proposed ward's last
11 surviving parent, if the declarant is deceased and the applicant
12 knows of the existence of the declaration; and

13 (9) each person named as next of kin in the application
14 for guardianship as required by Section 682(10) or (12) of this
15 code.

16 (d-1) The applicant shall file with the court:

17 (1) a copy of any notice required by Subsection (d) of
18 this section and the proofs of delivery of the notice; and

19 (2) an affidavit sworn to by the applicant or the
20 applicant's attorney stating:

21 (A) that the notice was mailed as required by
22 Subsection (d) of this section; and

23 (B) the name of each person to whom the notice was
24 mailed, if the person's name is not shown on the proof of delivery.

25 (f) The court may not act on an application for the creation
26 of a guardianship until the Monday following the expiration of the
27 10-day period beginning the date service of notice and citation has

1 been made as provided by Subsections (b), (c), and (d)(1) of this
2 section and the applicant has complied with Subsection (d-1) of
3 this section. The validity of a guardianship created under this
4 chapter is not affected by the failure of the [~~clerk or~~] applicant
5 to comply with the requirements of Subsections (d)(2)-(9)
6 [~~(d)(2)-(8)~~] of this section.

7 SECTION 5. Section 634, Texas Probate Code, is amended to
8 read as follows:

9 Sec. 634. SERVICE ON ATTORNEY. (a) If an attorney has
10 entered an appearance on record for a party in a guardianship
11 proceeding, a citation or notice required to be served on the party
12 shall be served on the attorney. Service on the attorney of record
13 is in lieu of service on the party for whom the attorney appears.
14 Except as provided by Section 633(e) [~~633(f)~~] of this code, an
15 attorney ad litem may not waive personal service of citation.

16 (b) A notice served on an attorney under this section may be
17 served by registered or certified mail, return receipt requested,
18 by any other form of mail requiring proof of delivery, or by
19 delivery to the attorney in person. A party to the proceeding or
20 the party's attorney of record, an appropriate sheriff or
21 constable, or another person who is competent to testify may serve
22 notice or citation to an attorney under this section.

23 (c) A written statement by an attorney of record, the return
24 of the officer, or the affidavit of a person that shows service is
25 prima facie evidence of the fact of service.

26 SECTION 6. Section 665B(a), Texas Probate Code, is amended
27 to read as follows:

1 (a) A court that creates a guardianship for a ward under
2 this chapter, on request of a person who filed an application to be
3 appointed guardian of the proposed ward or for the appointment of
4 another suitable person as guardian of the proposed ward, may
5 authorize compensation of an attorney who represents the person who
6 filed the application at the application hearing, regardless of
7 whether the person is appointed the ward's guardian, from:

8 (1) available funds of the ward's estate; or

9 (2) the county treasury if:

10 (A) the ward's estate is insufficient to pay for
11 the services provided by the attorney; and

12 (B) funds in the county treasury are budgeted for
13 that purpose.

14 SECTION 7. Section 682, Texas Probate Code, is amended to
15 read as follows:

16 Sec. 682. APPLICATION; CONTENTS. Any person may commence a
17 proceeding for the appointment of a guardian by filing a written
18 application in a court having jurisdiction and venue. The
19 application must be sworn to by the applicant and state:

20 (1) the name, sex, date of birth, and address of the
21 proposed ward;

22 (2) the name, relationship, and address of the person
23 the applicant desires to have appointed as guardian;

24 (3) whether guardianship of the person or estate, or
25 both, is sought;

26 (4) the nature and degree of the alleged incapacity,
27 the specific areas of protection and assistance requested, and the

1 limitation of rights requested to be included in the court's order
2 of appointment;

3 (5) the facts requiring that a guardian be appointed
4 and the interest of the applicant in the appointment;

5 (6) the nature and description of any guardianship of
6 any kind existing for the proposed ward in any other state;

7 (7) the name and address of any person or institution
8 having the care and custody of the proposed ward;

9 (8) the approximate value and description of the
10 proposed ward's property, including any compensation, pension,
11 insurance, or allowance to which the proposed ward may be entitled;

12 (9) the name and address of any person whom the
13 applicant knows to hold a power of attorney signed by the proposed
14 ward and a description of the type of power of attorney;

15 (10) if the proposed ward is a minor and if known by
16 the applicant:

17 (A) the name of each parent of the proposed ward
18 and state the parent's address or that the parent is [~~the names of~~
19 ~~the parents and next of kin of the proposed ward and whether either~~
20 ~~or both of the parents are] deceased;~~

21 (B) the name and age of each sibling, if any, of
22 the proposed ward and state the sibling's address or that the
23 sibling is deceased; and

24 (C) if each of the proposed ward's parents and
25 siblings are deceased, the names and addresses of the proposed
26 ward's next of kin who are adults;

27 (11) if the proposed ward is a minor, whether the minor

1 was the subject of a legal or conservatorship proceeding within the
2 preceding two-year period and, if so, the court involved, the
3 nature of the proceeding, and the final disposition, if any, of the
4 proceeding;

5 (12) if the proposed ward is an adult and if known by
6 the applicant:

7 (A) the name [~~60 years of age or older, the names~~
8 ~~and addresses, to the best of the applicant's knowledge,~~] of the
9 proposed ward's spouse, if any, and state the spouse's address or
10 that the spouse is deceased;

11 (B) the name of each of the proposed ward's
12 parents and state the parent's address or that the parent is
13 deceased;

14 (C) the name and age of each of the proposed
15 ward's siblings, if any, and state the sibling's address or that the
16 sibling is deceased;

17 (D) the name and age of each of the proposed
18 ward's children, if any, and state the child's address or that the
19 child is deceased; and

20 (E) if the proposed ward's spouse and each of the
21 proposed ward's parents, siblings, and children are deceased, or,
22 if there is no spouse, parent, adult sibling, or adult child, the
23 names and addresses of the proposed ward's next of kin who are
24 adults;

25 (13) facts showing that the court has venue over the
26 proceeding; and

27 (14) if applicable, that the person whom the applicant

1 desires to have appointed as a guardian is a private professional
2 guardian who has complied with the requirements of Section 697 of
3 this code.

4 SECTION 8. Section 687(c), Texas Probate Code, is amended
5 to read as follows:

6 (c) If the basis of the proposed ward's alleged incapacity
7 is mental retardation, the proposed ward shall be examined by a
8 physician or psychologist licensed in this state or certified by
9 the Texas Department of Mental Health and Mental Retardation to
10 perform the examination, unless there is written documentation
11 filed with the court that shows that the proposed ward has been
12 examined according to the rules adopted by the Texas Department of
13 Mental Health and Mental Retardation not earlier than 24 [~~six~~]
14 months before the date of a hearing to appoint a guardian for the
15 proposed ward. The physician or psychologist shall conduct the
16 examination according to the rules adopted by the Texas Department
17 of Mental Health and Mental Retardation and shall submit written
18 findings and recommendations to the court.

19 SECTION 9. Section 702(b), Texas Probate Code, is amended
20 to read as follows:

21 (b) A bond is not required to be given by a guardian that is:
22 (1) a corporate fiduciary, as defined by Section 601
23 of this code; [~~or~~]
24 (2) a guardianship program operated by a county; or
25 (3) a parent or sibling of the ward if:
26 (A) the parent or sibling is appointed only as
27 guardian of the person of the ward; and

1 (B) the court finds that the parent or sibling
2 has demonstrated a history of consistent attentiveness toward and
3 responsibility for the ward.

4 SECTION 10. Sections 729(a) and (e), Texas Probate Code,
5 are amended to read as follows:

6 (a) Not later than the 30th [~~90th~~] day after the date the
7 guardian of the estate qualifies as guardian, unless a longer time
8 is granted by the court, the guardian of the estate shall file with
9 the clerk of the court a verified, full, and detailed inventory, in
10 one written instrument, of all the property of the ward that has
11 come into the guardian's possession or knowledge. The inventory
12 filed by the guardian under this section must include:

13 (1) all real property of the ward that is located in
14 this state; and

15 (2) all personal property of the ward wherever
16 located.

17 (e) The court for good cause shown may require the filing of
18 the inventory and appraisal at a time not later than the 30th
19 [~~90th~~] day after the date of qualification of the guardian.

20 SECTION 11. Section 745(c), Texas Probate Code, as amended
21 by Chapters 127, 217, and 1174, Acts of the 77th Legislature,
22 Regular Session, 2001, is reenacted to read as follows:

23 (c) When the estate of a minor ward consists only of cash or
24 cash equivalents in an amount of \$100,000 or less, the guardianship
25 of the estate may be terminated and the assets paid to the county
26 clerk of the county in which the guardianship proceeding is
27 pending, and the clerk shall manage the funds as provided by Section

1 887 of this code.

2 SECTION 12. Section 765, Texas Probate Code, is amended to
3 read as follows:

4 Sec. 765. SUCCESSORS' RETURN OF INVENTORY, APPRAISEMENT,
5 AND LIST OF CLAIMS. A successor guardian who has qualified to
6 succeed a prior guardian shall make and return to the court an
7 inventory, appraisal, and list of claims of the estate, not
8 later than the 30th day [~~90 days~~] after the date the successor
9 guardian qualifies as guardian [~~of qualification~~], in the same
10 manner as is required of an original appointee. The successor
11 guardian shall in like manner as is required of an original
12 appointee return additional inventories, appraisements, and lists
13 of claims. In all orders appointing a successor guardian, the
14 court shall appoint an appraiser as in original appointments on the
15 application of any person interested in the estate.

16 SECTION 13. Subpart E, Part 4, Chapter XIII, Texas Probate
17 Code, is amended by adding Section 767A to read as follows:

18 Sec. 767A. INTERFERENCE WITH RIGHTS OF GUARDIAN OF THE
19 PERSON. (a) In this section, "possessory right" means the right of
20 a guardian of the person to have physical possession of a ward and
21 to establish the ward's legal domicile, as provided by Section
22 767(1) of this code.

23 (b) A person commits an offense if the person takes,
24 retains, or conceals a ward when the person knows that the person's
25 taking, retention, or concealment interferes with a possessory
26 right with respect to the ward.

27 (c) A person commits an offense if, with the intent to

1 interfere with a possessory right with respect to a ward, the person
2 knowingly entices or persuades the ward to leave the ward's legal
3 domicile established by the guardian.

4 (d) An offense under this section is a state jail felony.

5 SECTION 14. Section 768, Texas Probate Code, is amended to
6 read as follows:

7 Sec. 768. GENERAL POWERS AND DUTIES OF GUARDIAN OF THE
8 ESTATE. The guardian of the estate of a ward is entitled to the
9 possession and management of all property belonging to the ward, to
10 collect all debts, rentals, or claims that are due to the ward, to
11 enforce all obligations in favor of the ward, and to bring and
12 defend suits by or against the ward; but, in the management of the
13 estate, the guardian is governed by the provisions of this chapter.
14 It is the duty of the guardian of the estate to take care of and
15 manage the estate as a prudent person would manage the person's own
16 property, except as otherwise provided by this chapter. The
17 guardian of the estate shall account for all rents, profits, and
18 revenues that the estate would have produced by such prudent
19 management.

20 SECTION 15. Section 774(a), Texas Probate Code, is amended
21 to read as follows:

22 (a) On application, and if authorized by an order, the
23 guardian of the estate may renew or extend any obligation owed by or
24 to the ward. On written application to the court and when a
25 guardian of the estate deems it is in the best interest of the
26 estate, the guardian may, if authorized by an order of the court:

- 27 (1) purchase or exchange property;

1 (2) take a claim or property for the use and benefit of
2 the estate in payment of a debt due or owing to the estate;

3 (3) compound a bad or doubtful debt due or owing to the
4 estate;

5 (4) make a compromise or a settlement in relation to
6 property or a claim in dispute or litigation;

7 (5) compromise or pay in full any secured claim that
8 has been allowed and approved as required by law against the estate
9 by conveying to the holder of the secured claim the real estate or
10 personalty securing the claim, in full payment, liquidation, and
11 satisfaction of the claim, and in consideration of cancellation of
12 a note, deed of trust, mortgage, chattel mortgage, or other
13 evidence of a lien that secures the payment of the claim;

14 (6) abandon worthless or burdensome property and the
15 administration of that property. Abandoned real or personal
16 property may be foreclosed on by a secured party, trustee, or
17 mortgagee without further order of the court; ~~and~~

18 (7) purchase a prepaid funeral benefits contract; and

19 (8) establish a trust in accordance with 42 U.S.C.
20 Section 1396p(d)(4)(B), as amended, and direct that the income of
21 the ward specified by that section be paid directly to the trust,
22 solely for the purpose of the ward's eligibility for medical
23 assistance under Chapter 32, Human Resources Code.

24 SECTION 16. Section 776, Texas Probate Code, is amended to
25 read as follows:

26 Sec. 776. AMOUNTS ~~[SUMS]~~ ALLOWABLE FOR EDUCATION AND
27 MAINTENANCE OF WARD. (a) Subject to Section 777 of this code, if a

1 monthly allowance for the ward was not ordered in the court's order
2 appointing a guardian, the guardian of the estate shall file an
3 application with the court requesting a monthly allowance to be
4 expended from the income and corpus of the ward's estate [~~the court~~
5 ~~may direct the guardian of the person to expend,~~] for the education
6 and maintenance of the [~~guardian's~~] ward and the maintenance of the
7 ward's property.

8 (a-1) The guardian must file the application requesting the
9 monthly allowance not later than the 30th day after the date on
10 which the guardian qualifies as guardian or the date specified by
11 the court, whichever is later. The application must clearly
12 separate amounts requested for education and maintenance of the
13 ward from amounts requested for maintenance of the ward's property.

14 (a-2) In determining the amount of the monthly allowance for
15 the ward and the ward's property, the court shall consider the
16 condition of the estate and the income and corpus of the estate
17 necessary to pay the reasonably anticipated regular education and
18 maintenance expenses of the ward and maintenance expenses of the
19 ward's property. The court's order setting a monthly allowance must
20 specify the types of expenditures the guardian may make on a monthly
21 basis for the ward or the ward's property. An order setting a
22 monthly allowance does not affect the guardian's duty to account
23 for expenditures of the allowance in the annual account required by
24 Section 741 of this code[~~, a sum in excess of the income of the~~
25 ~~ward's estate. Otherwise, the guardian may not be allowed, for the~~
26 ~~education and maintenance of the ward, more than the net income of~~
27 ~~the estate].~~

1 (a-3) When different persons have the guardianship of the
2 person and estate of a ward, the guardian of the estate shall pay to
3 the guardian of the person the monthly allowance [~~a sum that is~~] set
4 by the court, at a time specified by the court, for the education
5 and maintenance of the ward. If the guardian of the estate fails to
6 pay to the guardian of the person the monthly allowance [~~sum~~] set by
7 the court, the guardian of the estate shall be compelled to make the
8 payment by court order after the guardian is duly cited to appear.

9 (b) When a guardian has in good faith expended funds from
10 the income and corpus of the estate of the ward [~~of the guardian~~]
11 for support and maintenance of [~~for~~] the ward [~~under this section or~~
12 ~~Section 777 of this code,~~] and the expenditures exceed the monthly
13 allowance authorized by the court, the guardian shall file a motion
14 with the court requesting approval of the expenditures. The court
15 may approve the excess expenditures if:

16 (1) the expenditures were made when it was [~~is~~] not
17 convenient or possible for the guardian to first secure court
18 approval;

19 (2) [, if] the proof is clear and convincing that the
20 expenditures were reasonable and proper;

21 (3) [, and are expenditures that] the court would have
22 granted authority in advance to make the expenditures; and

23 (4) [out of the corpus, and] the ward received the
24 benefits of the expenditures [~~, the court may approve the~~
25 ~~expenditures in the same manner as if the expenditures were made by~~
26 ~~the guardian out of the income from the ward's estate. An~~
27 ~~expenditure under this subsection may not exceed \$5,000 per ward~~

1 ~~during an annual accounting period, unless the expenditure is made~~
2 ~~to a nursing home in which case the court may ratify any amount].~~

3 SECTION 17. Section 814, Texas Probate Code, is amended to
4 read as follows:

5 Sec. 814. SPECIAL PROVISIONS PERTAINING TO LIVESTOCK. (a)
6 When the guardian of an estate has in the guardian's possession any
7 livestock that the guardian deems necessary or to the advantage of
8 the estate to sell, the guardian may, in addition to any other
9 method provided by law for the sale of personal property, obtain
10 authority from the court in which the estate is pending to sell the
11 livestock through a bonded livestock commission merchant or a
12 bonded livestock auction commission merchant.

13 (b) On written and sworn application by the guardian or by
14 any person interested in the estate that describes the livestock
15 sought to be sold and that sets out the reasons why it is deemed
16 necessary or to the advantage of the estate that the application be
17 granted, the court may authorize the sale. The court shall consider
18 the application and may hear evidence for or against the
19 application, with or without notice, as the facts warrant.

20 (c) If the application is granted, the court shall enter its
21 order to that effect and shall authorize delivery of the livestock
22 to any bonded livestock commission merchant or bonded livestock
23 auction commission merchant for sale in the regular course of
24 business. The commission merchant shall be paid the merchant's
25 ~~his~~ usual and customary charges, not to exceed five ~~three~~
26 percent of the sale price, for the sale of the livestock. A report
27 of the sale, supported by a verified copy of the merchant's account

1 of sale, shall be made promptly by the guardian to the court, but no
2 order of confirmation by the court is required to pass title to the
3 purchaser of the livestock.

4 SECTION 18. Subpart L, Part 4, Chapter XIII, Texas Probate
5 Code, is amended by adding Section 854 to read as follows:

6 Sec. 854. GUARDIAN REQUIRED TO KEEP ESTATE INVESTED UNDER
7 CERTAIN CIRCUMSTANCES. (a) The guardian of the estate is not
8 required to invest funds that are immediately necessary for the
9 education, support, and maintenance of the ward or others the ward
10 supports, if any, as provided by this chapter. The guardian of the
11 estate shall invest any other funds and assets available for
12 investment unless the court orders otherwise under this subpart.

13 (b) The court may, on its own motion or on written request of
14 a person interested in the guardianship, cite the guardian or the
15 guardian's investment agent to appear and show cause why the estate
16 is not invested or not properly invested. At any time after giving
17 notice to all parties, the court may conduct a hearing to protect
18 the estate, except that the court may not hold a final hearing on
19 whether the estate is properly invested until the 31st day after the
20 date the guardian or the guardian's investment agent was originally
21 cited to appear under this subsection. On the hearing of the
22 court's motion or a request made under this section, the court shall
23 render an order the court considers to be in the best interests of
24 the ward.

25 (c) The court may appoint a guardian ad litem for the
26 limited purpose of representing the ward's best interests with
27 respect to the investment of the ward's property at a hearing under

1 this section.

2 SECTION 19. The heading to Section 855, Texas Probate Code,
3 is amended to read as follows:

4 Sec. 855. STANDARD FOR MANAGEMENT AND INVESTMENTS [~~WITHOUT~~
5 ~~COURT ORDER~~].

6 SECTION 20. Section 855, Texas Probate Code, is amended by
7 amending Subsections (a) and (b) and adding Subsections (a-1) and
8 (g) to read as follows:

9 (a) In acquiring, investing, reinvesting, exchanging,
10 retaining, selling, supervising, and managing a ward's estate, a
11 guardian of the estate who has not delegated investment authority
12 to an agent as provided by Section 855C of this code shall exercise
13 the judgment and care under the circumstances then prevailing that
14 persons of ordinary prudence, discretion, and intelligence
15 exercise in the management of their own affairs, considering the
16 probable income from as well as the probable increase in value and
17 the safety of their capital. The guardian shall also consider all
18 other relevant factors, including:

19 (1) the anticipated costs of supporting the ward;
20 (2) the ward's age, education, current income, ability
21 to earn additional income, net worth, and liabilities;

22 (3) the nature of the ward's estate; and

23 (4) any other resources reasonably available to the

24 ward [~~The guardian of the estate may retain, without regard to~~
25 ~~diversification of investments and without liability for any~~
26 ~~depreciation or loss resulting from the retention, any property~~
27 ~~received into a guardianship estate at its inception or added to the~~

1 ~~estate by gift, devise, or inheritance or by mutation or increase.~~
2 ~~A guardian of the estate is not relieved from the duty to take care~~
3 ~~of and manage the estate as a person of ordinary prudence,~~
4 ~~discretion, and intelligence would exercise in the management of~~
5 ~~the person's own affairs].~~

6 (a-1) In determining whether a guardian has exercised the
7 standard of investment required by this section with respect to an
8 investment decision, the court shall, absent fraud or gross
9 negligence, take into consideration the investment of all the
10 assets of the estate over which the guardian has management or
11 control, rather than taking into consideration the prudence of only
12 a single investment made by the guardian.

13 (b) A guardian of the estate is considered to have exercised
14 the standard required by this section with respect to investing the
15 ward's estate if the guardian invests in the following [If the
16 ~~guardian of the estate has on hand money that belongs to the ward~~
17 ~~that exceeds that amount of money that may be necessary for the~~
18 ~~education and maintenance of the ward, the guardian shall invest~~
19 ~~the money as follows]:~~

20 (1) ~~[in]~~ bonds or other obligations of the United
21 States;

22 (2) ~~[in]~~ tax-supported bonds of this state;

23 (3) except as limited by Subsections (c) and (d) of
24 this section, ~~[in]~~ tax-supported bonds of a county, district,
25 political subdivision, or incorporated city or town in this state;

26 (4) ~~[in]~~ shares or share accounts of a state savings
27 and loan association or savings bank with its main office or a

1 branch office in this state if the payment of the shares or share
2 accounts is insured by the Federal Deposit Insurance Corporation;

3 (5) [~~in~~] the shares or share accounts of a federal
4 savings and loan association or savings bank with its main office or
5 a branch office in this state if the payment of the shares or share
6 accounts is insured by the Federal Deposit Insurance Corporation;

7 (6) [~~in~~] collateral bonds of companies incorporated
8 under the laws of this state, having a paid-in capital of \$1,000,000
9 or more, when the bonds are a direct obligation of the company that
10 issues the bonds and are specifically secured by first mortgage
11 real estate notes or other securities pledged with a trustee; or

12 (7) [~~in~~] interest-bearing time deposits that may be
13 withdrawn on or before one year after demand in a bank that does
14 business in this state where the payment of the time deposits is
15 insured by the Federal Deposit Insurance Corporation.

16 (g) The court may modify or eliminate the guardian's duty to
17 keep the estate invested or the standard required by this section
18 with regard to investments of estate assets on a showing by clear
19 and convincing evidence that the modification or elimination is in
20 the best interests of the ward and the ward's estate.

21 SECTION 21. Subpart L, Part 4, Chapter XIII, Texas Probate
22 Code, is amended by adding Sections 855A, 855B, and 855C to read as
23 follows:

24 Sec. 855A. RETENTION OF ASSETS. (a) A guardian of the
25 estate may retain without court approval until the first
26 anniversary of the date of receipt any property received into the
27 guardianship estate at its inception or added to the estate by gift,

1 devise, inheritance, mutation, or increase, without regard to
2 diversification of investments and without liability for any
3 depreciation or loss resulting from the retention. The guardian
4 shall care for and manage the retained assets as a person of
5 ordinary prudence, discretion, and intelligence would in caring for
6 and managing the person's own affairs.

7 (b) On application and a hearing, the court may render an
8 order authorizing the guardian to continue retaining the property
9 after the period prescribed by Subsection (a) of this section if the
10 retention is an element of the guardian's investment plan as
11 provided by this subpart.

12 Sec. 855B. PROCEDURE FOR MAKING INVESTMENTS OR RETAINING
13 ESTATE ASSETS. (a) Not later than the first anniversary of the
14 date on which the guardian of the estate qualified as guardian, the
15 guardian shall file a written application with the court for an
16 order:

17 (1) authorizing the guardian to:

18 (A) develop and implement an investment plan for
19 estate assets;

20 (B) delegate investment authority with respect
21 to one or more estate assets as provided in this subpart;

22 (C) declare that one or more estate assets must
23 be retained, despite being underproductive with respect to income
24 or overall return; or

25 (D) loan estate funds, invest in real estate or
26 make other investments, or purchase a life, term, or endowment
27 insurance policy or an annuity contract; or

1 (2) modifying or eliminating the guardian's duty to
2 invest the estate.

3 (b) On hearing the application under this section and on a
4 finding by the preponderance of the evidence that the action
5 requested in the application is in the best interests of the ward
6 and the ward's estate, the court shall render an order granting the
7 authority requested in the application or an order modifying or
8 eliminating the guardian's duty to keep the estate invested. The
9 order must state in reasonably specific terms:

10 (1) the nature of the investment, investment plan, or
11 other action requested in the application and authorized by the
12 court;

13 (2) when an investment must be reviewed and
14 reconsidered by the guardian; and

15 (3) whether the guardian must report the guardian's
16 review and recommendations to the court.

17 (c) The fact that an account or other asset is the subject of
18 a specific or general gift under a ward's will, if any, or that a
19 ward has funds, securities, or other property held with a right of
20 survivorship does not prevent:

21 (1) a guardian of the estate from taking possession
22 and control of the asset or closing the account; or

23 (2) the court from authorizing an action or modifying
24 or eliminating a duty with respect to the possession, control, or
25 investment of the account or other asset.

26 (d) The procedure prescribed by this section does not apply
27 if a different procedure is prescribed for an investment or sale by

1 a guardian. A guardian is not required to follow the procedure
2 prescribed by this section with respect to an investment or sale
3 that is specifically authorized by other law.

4 Sec. 855C. DELEGATION OF INVESTMENT AUTHORITY. (a) On
5 application by a guardian of the estate, the court may render an
6 order authorizing the guardian to employ an investment agent and
7 delegate to the agent investment decisions with respect to the
8 guardianship estate.

9 (b) A guardian who delegates investment authority to an
10 agent as provided by this section is subject to the standard
11 required by Section 855 of this code in delegating investment
12 decisions to the agent.

13 (c) In determining whether a guardian of the estate
14 exercised the standard required by Section 855 of this code with
15 respect to delegating investment decisions to an agent, the court
16 shall, absent fraud or gross negligence, take into consideration
17 the investment of all the assets of the estate over which the
18 guardian has management or control, rather than taking into
19 consideration the prudence of only a single investment made by the
20 guardian or agent.

21 (d) Except as provided by this subsection, the guardian of
22 the estate and the guardian's surety are liable for the agent's
23 investment decisions. A guardian of the estate and the guardian's
24 surety are not liable for investment decisions made by an agent
25 employed in accordance with this section if:

26 (1) the guardian exercises the required standard in
27 selecting the agent and establishing the scope and terms of the

1 authority delegated to the agent;

2 (2) the guardian investigates the credentials of the
3 agent, including:

4 (A) reviewing the agent's experience, investment
5 performance history, and financial stability, including verifying
6 the agent's capital and surplus; and

7 (B) verifying that the agent is licensed or
8 registered, if required, and is bonded or insured, if required;

9 (3) the agent is subject to the jurisdiction of the
10 courts of this state;

11 (4) the terms of the delegation agreement provide that
12 the agent is subject to the standard prescribed by Section 855 of
13 this code or the standard established by court order and the agent
14 assumes liability for deviating from that standard; and

15 (5) the guardian reviews the investment decisions made
16 by the agent at least as frequently as annually to verify compliance
17 with the investment plan developed by the guardian.

18 (e) The delegation agreement may also include a requirement
19 of safekeeping of estate assets in a financial institution as
20 provided by Section 703(e) of this code.

21 SECTION 22. The heading to Section 857, Texas Probate Code,
22 is amended to read as follows:

23 Sec. 857. INVESTMENT IN, OR CONTINUED INVESTMENT IN, LIFE
24 INSURANCE OR ANNUITIES.

25 SECTION 23. Section 858, Texas Probate Code, is amended to
26 read as follows:

27 Sec. 858. LOANS AND SECURITY FOR LOANS. (a) If, at any

1 time, the guardian of the estate has on hand money belonging to the
2 ward in an amount that provides a return that is more than is
3 ~~[beyond what may be]~~ necessary for the education, support, and
4 maintenance of the ward and others the ward supports, if
5 applicable, the guardian may lend the money for a reasonable ~~[the~~
6 ~~highest]~~ rate of interest ~~[that can be obtained for the money]~~. The
7 guardian shall take the note of the borrower for the money that is
8 loaned, secured by a mortgage with a power of sale on unencumbered
9 real estate located in this state worth at least twice the amount of
10 the note, or by collateral notes secured by vendor's lien notes, as
11 collateral, or the guardian may purchase vendor's lien notes if at
12 least one-half has been paid in cash or its equivalent on the land
13 for which the notes were given.

14 (b) A guardian of the estate is considered to have obtained
15 a reasonable rate of interest for a loan for purposes of Subsection
16 (a) of this section if the rate of interest is at least equal to 120
17 percent of the applicable short-term, midterm, or long-term
18 interest rate under Section 7520, Internal Revenue Code of 1986, as
19 amended, for the month during which the loan was made.

20 (c) Except as provided by this subsection, a guardian of the
21 estate who loans estate money with the court's approval on security
22 approved by the court is not personally liable if the borrower is
23 unable to repay the money and the security fails. If the guardian
24 committed fraud or was negligent in making or managing the loan,
25 including in collecting on the loan, the guardian and the
26 guardian's surety are liable for the loss sustained by the
27 guardianship estate as a result of the fraud or negligence.

1 (d) Except as provided by Subsection (e) of this section, a
2 guardian of the estate who lends estate money may not pay or
3 transfer any money to consummate the loan until the guardian:

4 (1) submits to an attorney for examination all bonds,
5 notes, mortgages, abstracts, and other documents relating to the
6 loan; and

7 (2) receives a written opinion from the attorney
8 stating that the documents under Subdivision (1) of this subsection
9 are regular and that the title to relevant bonds, notes, or real
10 estate is clear.

11 (e) A guardian of the estate may obtain a mortgagee's title
12 insurance policy on any real estate loan in lieu of an abstract and
13 attorney's opinion under Subsection (d) of this section.

14 (f) The borrower shall pay attorney's fees for any legal
15 services required by this section.

16 (g) Not later than the 30th day after the date the guardian
17 of the estate loans money from the estate, the guardian shall file
18 with the court a written report, accompanied by an affidavit,
19 stating fully the facts related to the loan. This subsection does
20 not apply to a loan made in accordance with a court order.

21 (h) This section does not apply to an investment in a
22 debenture, bond, or other publicly traded debt security.

23 SECTION 24. Section 860(a), Texas Probate Code, is amended
24 to read as follows:

25 (a) The [When the] guardian of the estate may invest estate
26 assets in real estate if:

27 (1) the guardian believes that the investment is in

1 the best interests of the ward;

2 (2) there are on hand sufficient additional assets to
3 provide a return sufficient to provide for:

4 (A) the education, support, and maintenance of
5 the ward and others the ward supports, if applicable; and

6 (B) the maintenance, insurance, and taxes on the
7 real estate in which the guardian wishes to invest;

8 (3) the guardian files ~~[of a ward thinks it is best for~~
9 ~~the ward who has a surplus of money on hand to invest the money in~~
10 ~~real estate, the guardian shall file]~~ a written application with
11 ~~[in]~~ the court ~~[in which the guardianship is pending]~~ requesting a
12 court order authorizing the guardian to make the desired investment
13 and stating the reasons why the guardian is of the opinion that the
14 investment would be for the benefit of the ward; and

15 (4) the court renders an order authorizing the
16 investment as provided by this section.

17 SECTION 25. Section 863, Texas Probate Code, is amended to
18 read as follows:

19 Sec. 863. LIABILITY OF GUARDIAN AND GUARDIAN'S SURETY ~~[FOR~~
20 ~~FAILURE TO LEND OR INVEST FUNDS]~~. (a) In addition to any other
21 remedy authorized by law, if ~~[If]~~ the guardian of the estate fails
22 ~~[neglects]~~ to invest or lend estate assets in the manner provided by
23 this subpart, the guardian and the guardian's surety are ~~[surplus~~
24 ~~money on hand at interest when the guardian can do so by using~~
25 ~~reasonable diligence, the guardian shall be]~~ liable for the
26 principal and the greater of:

27 (1) [for] the highest legal rate of interest on the

1 principal during the period the guardian failed to invest or lend
2 the assets; or

3 (2) the overall return that would have been made on the
4 principal if the principal were invested in the manner provided by
5 this subpart.

6 (b) In addition to the liability under Subsection (a) of
7 this section, the guardian and the guardian's surety are liable for
8 attorney's fees, litigation expenses, and costs related to a
9 proceeding brought to enforce this section [~~for the time the~~
10 ~~guardian neglects to invest or lend the surplus money. The amount~~
11 ~~of principal and interest on the principal may be recovered in a~~
12 ~~court of competent jurisdiction~~].

13 SECTION 26. Section 868A, Texas Probate Code, is amended to
14 read as follows:

15 Sec. 868A. DISCHARGE OF GUARDIAN OF ESTATE AND CONTINUATION
16 OF TRUST. On or at any time after the creation of a trust under this
17 subpart, the court may discharge the guardian of the ward's estate
18 [~~only~~] if [~~a guardian of the ward's person remains and~~] the court
19 determines that the discharge is in the ward's best interests.

20 SECTION 27. Section 883, Texas Probate Code, is amended by
21 adding Subsections (f), (g), and (h) to read as follows:

22 (f) This section does not partition community property
23 between an incapacitated spouse and a spouse who is not
24 incapacitated.

25 (g) If the court renders an order directing the guardian of
26 the estate of the incapacitated spouse to administer certain
27 community property as provided by Subsection (c) of this section,

1 the community property administered by the guardian is considered
2 the incapacitated spouse's community property, subject to the
3 incapacitated spouse's sole management, control, and disposition
4 under Section 3.102, Family Code. If the court renders an order
5 directing the spouse who is not incapacitated to administer certain
6 community property as provided by Subsection (d) of this section,
7 the community property administered by the spouse who is not
8 incapacitated is considered that spouse's community property,
9 subject to that spouse's sole management, control, and disposition
10 under Section 3.102, Family Code.

11 (h) An order described by Subsection (g) of this section
12 does not affect the enforceability of a creditor's claim existing
13 on the date the court renders the order.

14 SECTION 28. Sections 389, 856, 859, and 864, Texas Probate
15 Code, are repealed.

16 SECTION 29. The changes in law made by Sections 1 and 2 of
17 this Act apply only to a proceeding instituted on or after the
18 effective date of this Act. A proceeding instituted before the
19 effective date of this Act is governed by the law in effect on the
20 date the proceeding was instituted, and the former law is continued
21 in effect for that purpose.

22 SECTION 30. The change in law made by Section 3 of this Act
23 applies only to a motion to transfer or a cause of action filed on or
24 after the effective date of this Act.

25 SECTION 31. The changes in law made by Sections 4-8 of this
26 Act apply only to an application for the appointment of a guardian
27 filed on or after the effective date of this Act. An application

1 for the appointment of a guardian filed before the effective date of
2 this Act is governed by the law in effect on the date the
3 application was filed, and the former law is continued in effect for
4 that purpose.

5 SECTION 32. The changes in law made by Sections 9, 10, and
6 12 of this Act apply only to a person appointed by a court to serve
7 as guardian of the person or estate of a ward on or after the
8 effective date of this Act. A person appointed by a court to serve
9 as guardian of the person or estate of a ward before the effective
10 date of this Act is governed by the law in effect immediately before
11 the effective date of this Act, and the former law is continued in
12 effect for that purpose.

13 SECTION 33. (a) The changes in law made by Sections 14-25
14 of this Act apply only to an application for the appointment of a
15 guardian that is filed on or after September 1, 2003.

16 (b) The following may be modified to conform to the changes
17 in law made by Sections 14-25 of this Act:

18 (1) an application for the appointment of a guardian
19 that is filed before September 1, 2003, in which a guardianship has
20 not been created; and

21 (2) a guardianship existing on September 1, 2003.

22 SECTION 34. This Act takes effect September 1, 2003.